Opinion issued August 16, 2022

In The

Court of Appeals

For The

First District of Texas

NO. 01-20-00615-CV

JETALL COMPANIES, INC., Appellant

V.

RICHARD HEIL, TODD OAKUM, AND RENEE DAVY F/K/A RENEE DAVY F/K/A RENEE OAKUM, Appellees

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On Appeal from the 152nd District Court
Harris County, Texas
Trial Court Case No. 2017-10832

MEMORANDUM OPINION

After a jury trial, the trial court rendered a judgment against appellant Jetall Companies, Inc. ("Jetall") on its tort and contract claims against appellees Richard Heil ("Heil"), Todd Oakum ("Oakum"), and Renee Davy ("Davy") (collectively,

"appellees").[1] On appeal, Jetall contends the trial court erred by (1) rescinding an order of mistrial and (2) refusing to incorporate an interlocutory default judgment against Oakum into the final judgment.[2]

We affirm.

Background

Jetall's claims against appellees in the underlying lawsuit derive from an earlier, separate lawsuit to which appellees were parties but Jetall was not—namely, a wrongful termination suit brought by Heil against Oakum and Davy ("Heil Lawsuit") in 2014. Oakum and Davy employed Heil as the Chief Financial Officer of the title company they co-owned, Declaration Title, LLC, with each holding a 50% interest. After he was fired, Heil sued Oakum, Davy, and Declaration Title for wrongful termination and obtained a $3 million jury verdict. Heil agreed not to move for entry of judgment on the jury verdict for 60 days to give Oakum and Davy time to fund a potential settlement.

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[1] We note the case style in the trial court's judgment, which carries forward in this appeal, contains an error listing Renee Davy's name twice.

[2] Jetall raised a third issue in its opening brief, contending the trial court erred by refusing a bench trial on appellees' attorney's fees. Jetall withdrew this issue in its reply brief, recognizing that the second supplemental reporter's record filed after Jetall's opening brief refuted the complained-of error and showed the trial court conducted an evidentiary hearing on attorney's fees. Accordingly, we do not consider Jetall's withdrawn, third issue.

Before the 60 days expired, Oakum contacted Jetall's owner, Ali Choudhri ("Choudhri"), about borrowing money to fund a settlement of the Heil Lawsuit. Oakum knew Choudhri because Declaration Title leased office space from Jetall. Choudhri proposed that Jetall would assume liability for the Heil Lawsuit verdict in exchange for obtaining Oakum's and Davy's interests in Declaration Title. According to Jetall, it entered a binding agreement with Oakum for his 50% interest in Declaration Title on June 25, 2016 and, a few days later, entered a similar agreement with Davy for her 50% interest in Declaration Title. Oakum and Davy disputed that they executed final agreements to transfer their ownership of Declaration Title to Jetall. In August 2016, they instead assigned their collective 100% interest in Declaration Title to Heil and his partner, Julio Fernandez ("Fernandez"), in settlement of the Heil Lawsuit.

Six months later, Jetall sued Heil, Oakum, and Davy, alleging it was the rightful owner of Declaration Title. Jetall pleaded claims against Oakum and Davy for breach of contract, common law fraud, statutory fraud, aiding and abetting, and civil conspiracy; and against Heil for tortious interference, aiding and abetting, and civil conspiracy. In addition to the remedies of specific performance on its contract claims and damages, Jetall sought a declaratory judgment that the agreements with Oakum and Davy were "valid and enforceable," making Jetall "the 100% owner of Declaration Title," and that the purported sale and transfer to Heil and Fernandez

was "invalid, null, and void." Jetall later added a declaratory judgment claim against Fernandez based on his ownership interest in Declaration Title.

The case proceeded to trial in March 2020. At the pretrial hearing on March 9, the trial court granted a no-answer default judgment against Oakum, who failed to answer Jetall's lawsuit and did not appear for trial. The other parties gave opening statements and began taking witness testimony the next day, on Tuesday, March 10. At the end of the first week of trial—on Friday, March 13—the Governor of Texas declared a state of disaster in the State's 254 counties in response to the imminent threat of the COVID-19 pandemic. Effective the same day, the Texas Supreme Court issued an emergency order on the conduct of court proceedings during the disaster, which provided in pertinent part:

> 2. Subject only to constitutional limitations, all courts in Texas may in any case, civil or criminal—and must to avoid risk to court staff, parties, attorneys, jurors, and the public—without a participant's consent:
>
> a. Modify or suspend any and all deadlines and procedures, whether prescribed by statute, rule, or order, for a stated period ending no later than 30 days after the Governor's state of disaster has been lifted; [and]
>
> . . .
>
> f. Take any other reasonable action to avoid exposing court proceedings to the threat of COVID-19.

See First Emergency Order Regarding the COVID-19 State of Disaster, 596 S.W.3d 265 (Tex. 2020).

When the parties reconvened the following Monday, March 16, the trial court informed them he was getting "pressure from [his] colleagues to declare a mistrial and send everyone home." He stated: "I'm thinking about that because it's not just your lawsuit that's important here. It's those twelve folks who are sitting in the jury room right now." Ultimately, the trial court did not grant a mistrial that Monday and allowed the case to proceed. But on each day that followed, the trial court expressed growing concern for the developing pandemic. On Tuesday, March 17, the trial court warned the parties that he would grant a mistrial if the trial was not completed within two days. Jetall rested at the end of the day on March 17. The next morning, before Heil or Davy presented any evidence, the trial court expressed skepticism that the trial could be completed on time, considering the remaining witnesses and the time needed to prepare the jury charge, and orally declared a mistrial.

Immediately after the trial court ordered the mistrial, counsel for Heil and Davy asked the trial court to reconsider his ruling. Counsel indicated that to avoid the expense of a second trial while addressing the trial court's health and safety concerns, the defense would rest without presenting any evidence so that the jury

could deliberate that afternoon. After discussions with counsel for both sides, the trial court rescinded his order of mistrial.[3]

After hearing closing arguments and deliberating for less than an hour, the jury returned a unanimous defense verdict. The jury found that neither Oakum nor Davy agreed "to assign their collective 100% membership interest in Declaration Title[ ] to Jetall," and that Davy did not commit fraud against Jetall. Because the jury did not find an agreement by Oakum or Davy to transfer their interest in Declaration Title to Jetall, it did not reach the charge questions related to Heil's alleged interference with that agreement or his participation in an alleged conspiracy with Davy that damaged Jetall. Nor did the jury answer any damages question. The trial court accepted the jury's verdict without objection from either party.

Two days after the trial court accepted the jury verdict, Jetall filed a written motion for mistrial, arguing that the pandemic had prejudiced the jury's deliberations. Jetall complained in the motion that the trial court's decision to submit the case to the jury required the jurors to deliberate near one another, after state and local authorities issued emergency orders encouraging the suspension of in-person

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[3] The jury was not present in the courtroom when the trial court first granted and then rescinded the order of mistrial. The trial court indicated in his on-the-record comments that he had spoken with the jurors and they were "willing" to continue, "but nobody's staying past today [Wednesday, March 18]." The jury was never discharged.

proceedings, and improperly influenced the jurors to rush their deliberations. Without supporting affidavits from jurors or other exhibits, the motion recited:

> Many of the jurors stated, as they were rushing to leave the courthouse, that they wanted to be done with their deliberations and leave the courthouse by five p.m. The jury was improperly motivated and influenced by the specter of life and health to quickly answer the jury charge in a manner that could result in a quick deliberation. The jury spent more time in reading the verdict and selecting the foreman before even considering the parties' trial exhibits or the evidence.

Appellees responded that Jetall's post-verdict mistrial motion was untimely. In addition, they argued waiver based on Jetall's failure to object when the trial court rescinded its order of mistrial and submitted the case to the jury. The trial court denied Jetall's motion for mistrial.[4]

Heil, Fernandez, and Davy jointly moved for entry of judgment on the jury's verdict, requesting, among other things, that the trial court set aside the interlocutory default judgment against Oakum as inconsistent with the jury's finding that neither Oakum nor Davy had agreed "to assign their collective 100% membership interest in Declaration Title" to Jetall. For its part, Jetall opposed the motion for entry of judgment and requested the trial court declare that it owned 50% of Declaration Title based on Oakum's no-answer default. The trial court ultimately entered the final

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[4] Jetall reurged its complaint about the jury's rushed deliberations in other post-verdict filings, including in its opposition to appellees' motion for entry of judgment on the jury's verdict. The trial court did not grant any relief based on Jetall's complaints.

judgment requested by Heil, Fernandez, and Davy, thereby rejecting Jetall's request for a declaration of its ownership interest in Jetall. The final judgment ordered that:

- Jetall take nothing on its claims against any appellee, including Oakum;
- Jetall owns no interest in Declaration Title; and
- Heil and Fernandez, "collectively, are and have been the true and lawful owners of 100% of Declaration Title" since August 2016.

The final judgment also awarded Heil and Davy their attorney's fees, interest, and costs.

Mistrial

In its first issue, Jetall argues the trial court abused its discretion by rescinding its order of mistrial and requiring the jury to deliberate under the imminent threat of the COVID-19 pandemic.[5] According to Jetall, the jury was improperly influenced to rush its deliberations by the "specter of the Coronavirus."

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[5] There is no question that the trial court retained jurisdiction to rescind the mistrial order. *See Jack v. Holiday World of Hou.*, 262 S.W.3d 42, 47 (Tex. App.—Houston [1st Dist.] 2008, no pet.) (trial court retained jurisdiction to withdraw order of mistrial and resume trial); *see also Rodriguez v. State*, 852 S.W.2d 516, 520 (Tex. Crim. App. 1993) ("[A]t least as a matter of jurisdiction, the trial court does not lack authority to withdraw or rescind its order of mistrial. . . . That an order granting a mistrial that is not subsequently withdrawn [has] the effect of nullifying all proceedings to that point does not mean the trial court may not rescind that order, and continue with the trial, so long as that remains a viable option under the circumstances."); *Montemayor v. State*, 55 S.W.3d 78, 87 n.2 (Tex. App.—Austin 2001, no pet.) ("By failing to discharge the jury and by ordering the jury to resume deliberation, the court implicitly withdrew its decision to grant a mistrial."). Jetall's issue regards only whether the trial court abused its discretion by doing so. *See Epps v. Deboise*, 537 S.W.3d 238, 249 (Tex. App.—Houston [1st Dist.] 2017, no pet.)

There is a question whether Jetall preserved this issue for appellate review. Generally, to preserve error for our review, the complaining party must raise the complaint before the trial court by way of a timely request, objection, or motion and either obtain an express or implicit ruling or pursue the request until the trial court refuses to rule. *See* TEX. R. APP. P. 33.1(a). The parties disagree whether the trial court initially granted a mistrial sua sponte or on Jetall's motion. We need not resolve that disagreement because it is not controlling. The ruling that is the subject of Jetall's complaint on appeal is not the trial court's decision to grant a mistrial in the first instance but its decision *rescinding* the mistrial. And as to the rescission, Jetall made no objection that the jury could not properly deliberate because of COVID-related health and safety concerns either before the case was submitted to the jury or before the trial court accepted the jury's verdict. *See id.*

Even if we presume, without deciding, that Jetall preserved error by moving post-verdict for a mistrial and that the trial court could grant Jetall's motion after it discharged the jury, our review is limited by the abuse-of-discretion standard that applies to the trial court's decision to grant or deny a mistrial. *See Epps v. Deboise*, 537 S.W.3d 238, 249 (Tex. App.—Houston [1st Dist.] 2017, no pet.) (appellate court reviews trial court's ruling on motion for mistrial for abuse of discretion); *Schlafly*

(appellate court reviews trial court's decision to grant or deny mistrial for abuse of discretion).

v. Schlafly, 33 S.W.3d 863, 868 (Tex. App.—Houston [14th Dist.] 2000, pet. denied) (appellate court "does not substitute its judgment for that of the trial court but decides whether the trial court's decision constitutes an abuse of discretion"). And no abuse of discretion is shown on this record.

The trial court's charge instructed the jury to consider "the evidence admitted in court," to base its answers on a "preponderance of the evidence," and not to "consider the effect [its] answers will have." In the absence of evidence to the contrary, an appellate court "must assume that a jury properly followed the trial court's instructions." *Turner, Collie & Braden, Inc. v. Brookhollow, Inc.*, 642 S.W.2d 160, 167 (Tex. 1982); *Lewis v. United Parcel Serv., Inc.*, 175 S.W.3d 811, 817 (Tex. App.—Houston [1st Dist.] 2004, pet. denied). Jetall's mistrial motion was not accompanied by any affidavit or other evidence that COVID-related health and safety concerns improperly influenced the jury to ignore the evidence to reach a quick verdict. Instead, it rested on the assertion that informal polling of the jurors after trial revealed that they rushed deliberations out of fear of COVID-19 and because they wanted to "leave the courthouse by five p.m." But that assertion was unsupported, as neither the informal polling cited in the motion nor the jurors' purported confession of rushed deliberations is reflected in the record.

Jetall points to the trial court's remark on March 18 that "nobody's staying past today" as evidence the jury could not reach an impartial verdict because it had

predetermined the length of its deliberations, but the trial court's remark does not establish that the jury refused to properly consider the evidence in reaching its verdict. It is not clear from the record whether the trial court's remark reflected his own preference not to continue beyond March 18 or the jury's refusal to do so.[6] Consequently, we cannot conclude on this record that the trial court abused its discretion either by rescinding its order of mistrial or by denying Jetall's post-verdict motion for mistrial on the basis that the jury's verdict was improperly influenced by COVID-related health and safety concerns.

We overrule Jetall's first issue.

Interlocutory Default Judgment

In its second issue, Jetall contends the trial court erred by not including in the final judgment a declaration that Jetall is a 50% owner of Declaration Title. According to Jetall, the interlocutory default judgment based on Oakum's failure to answer had the effect of admitting Oakum's liability for agreeing to transfer his interest in Declaration Title to Jetall and nullifying his assignment of the same

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[6] The trial court remarked in full:

> THE COURT: I've visited with the jury - -
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> [Jetall's counsel]: Okay.
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> THE COURT: - - and they're here. So they will be willing - - everybody's okay on that, but nobody's staying past today.

interest to Heil and Fernandez. In other words, Jetall asserts: Heil's and Fernandez's "purported assignments and ownership in Declaration Title were void to the extent they received it from Oakum because Oakum had—by virtue of the Trial Default—already assigned his interest to Jetall." While we agree that a party like Oakum, who fails to answer a lawsuit against him, generally is "said to have admitted both the truth of facts set out in the petition and [his] liability on any cause of action properly alleged by those facts," *see Paradigm Oil, Inc. v. Retamco Operating, Inc.*, 372 S.W.3d 177, 183 (Tex. 2012), we disagree the default judgment against Oakum required the trial court to declare Jetall a 50% owner of Declaration Title.

Jetall cites this Court's opinion in *Sustainable Texas Oyster Resource Management, L.L.C. v. Hannah Reef, Inc.* for the proposition that a trial court's final judgment incorporates prior interlocutory orders as a matter of law. *See* 623 S.W.3d 851, 863 (Tex. App.—Houston [1st Dist.] 2020, pet. filed). There, the parties asserted competing rights to cultivate and harvest oysters in certain areas of Galveston and Trinity Bays. *Id.* at 854. A group of oystermen with oyster leases issued by the Texas Parks and Wildlife Department ("TPWD") entitling them to cultivate and harvest oyster beds in submerged lands brought an action against STORM, a company claiming an exclusive right to engage in oyster-production activities in the same area through a coastal surface lease issued by a regional navigation district. *Id.* The oystermen asserted claims to quiet title and for trespass

to try title, tortious interference with prospective business relations, and declaratory relief. STORM filed counterclaims, including for trespass. *Id.* In a pretrial, partial summary judgment in favor of the oystermen, the trial court declared: (1) the TPWD had the exclusive authority to regulate oyster cultivation and harvesting, (2) the navigation district did not have the legal authority to issue the coastal surface lease to STORM, and (3) STORM's coastal surface lease was void and unenforceable against the oystermen's rights. *Id.* at 855. The trial court also declared that the oystermen were not trespassers as a matter of law and ordered that STORM take nothing on its counterclaims. *Id.* After a jury trial on attorney's fees, the trial court rendered a final judgment awarding the oystermen fees. *Id.* The final judgment also ordered that the oystermen take nothing on their claim for trespass to try title. *Id.*

On appeal, STORM asserted that the final judgment's provision ordering that the oystermen take nothing on their trespass-to-try-title claim conflicted with the declarations in the partial summary judgment order. *Id.* at 869–70. STORM argued: "because the final judgment render[ed] judgment against the Oystermen on their trespass to try title claim, it necessarily vest[ed] title and the right of possession to the land in STORM." *Id.* at 870. But this Court found no conflict between the final judgment and the partial summary judgment because the declarations did not give the oystermen ownership or possession of the disputed areas. *Id.* Consequently, the Court held the declaratory relief granted to the oystermen was not erroneous. *Id.*

This holding is consistent with the general rule that interlocutory orders that are not inconsistent merge into a final judgment. *See generally Paulsen v. Yarrell*, 537 S.W.3d 224, 234 (Tex. App.—Houston [1st Dist.] 2017, pet. denied) ("Unless modified, interlocutory orders merge into the final judgment."); *see also Quanaim v. Frasco Rest. & Catering*, 17 S.W.3d 30, 39–40 (Tex. App.—Houston [14th Dist.] 2000, pet. denied) (holding that second judgement vacated first judgment with which second judgment was inconsistent, even though trial court did not refer to first judgment or expressly state intention to vacate prior judgment in second judgment); *Ho v. Univ. of Tex. at Arlington*, 984 S.W.2d 672, 680 (Tex. App.—Amarillo 1998, pet. denied) (holding that terms of judgment disposing of all parties and claims necessarily vacates prior inconsistent interlocutory order, even though trial court did not refer to prior order or expressly state intention to vacate prior order in second judgment). Jetall urges this is what should have occurred here because a declaration that Jetall owns 50% of Declaration Title based on the default judgment against Oakum is not inconsistent with the jury's finding that neither Oakum nor Davy agreed to "assign their collective 100% membership interest in Declaration Title" to Jetall. According to Jetall, the assignment of Oakum's and Davy's collective interests is a separate issue from the assignment of Oakum's singular 50% interest under the default judgment.

Appellees respond that the declaratory relief requested by Jetall irreconcilably conflicts with the jury's finding, and thus the trial court did not err by refusing to incorporate such relief into the final judgment. We need not resolve the parties' disagreement because, under the law requiring that all persons who have or claim an interest that would be affected by the declaration must be made parties, the default judgment could not have encompassed the declaratory relief requested by Jetall. *See* TEX. CIV. PRAC. & REM. CODE § 37.006(a).

Although Jetall's petition requested a judgment declaring that it owns 100% of Declaration Title and that "the purported sale and transfer to Heil and Fernandez is therefore invalid, null[,] and void," Heil and Fernandez also claimed a 100% interest in Declaration Title. The Texas Declaratory Judgments Act requires that:

> When declaratory relief is sought, all persons who have or claim any interest that would be affected by the declaration must be made parties. A declaration does not prejudice the rights of a person not a party to the proceeding.

Id. Under this provision, Heil and Fernandez were necessary parties to any judgment declaring ownership of Declaration Title. *See id.* Unlike Oakum, they answered Jetall's lawsuit, appeared to defend against Jetall's claims, and asserted their own interest in Declaration Title. Consequently, the trial court could not have determined the question of ownership as to Oakum's 50% interest by order of default against Oakum, because doing so would have excluded Heil and Fernandez as necessary parties to that controversy. *See id.*; *see also* TEX. R. CIV. P. 240 ("Where there are

several defendants, some of whom have answered or have not been duly served and some of whom have been duly served and have made default, an interlocutory judgment by default may be entered *against those who made default*, and the cause may proceed or be postponed as to the others." (emphasis added)). We therefore find no error in the trial court's refusal to grant Jetall declaratory relief in the final judgment based on the default judgment against Oakum.

We overrule Jetall's second issue.

Conclusion

We affirm the trial court's judgment.

Amparo Guerra
Justice

Panel consists of Justices Landau, Guerra, and Farris.